Office-Supreme Court, U.S.
FILED
FEB 4 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 777

RAYMOND W. FLEMING
Petitioner,

-versus-

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

RAY T. MCCANN
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Counsel for Petitioner

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

INDEX

Page

Authorities Cited i

Reply to Respondent's Statement of the Case 1

Reply to Respondent's Statement of Reasons for Denying the Writ 3

Conclusion 10

AUTHORITIES CITED

Cases Cited

Carbo v. U. S. (1961) 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. (2d) 329 7

Fay v. Noia (1963) 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837 7

Goyer v. State of Wisconsin (1965) 26 Wis. (2d) 00, 131 N.W. (2d) 888 8

Hindson v. Kersey (1765) 8 How. St. Tr. 57 Fn..... 9

Michigan National Bank v. Robertson (1963) 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. (2d) 961 5

Raley v. State of Ohio (1959) 360 U.S. 423, 79 S.Ct. 257, 3 L. Ed. (2d) 1344 5

United States v. Holovachka (7th Cir. 1963) 314 F. 2d 345 cert. den. 374 U.S. 809, 83 S. Ct. 1695.... 6

Other Authorities

Black's Law Dictionary, Third Edition, page 587.... 9

Blackstone Commentaries, 129-132 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 777

RAYMOND W. FLEMING

Petitioner,

-versus-

MICHAEL S. WOLKE,
Sheriff of Milwaukee County,

Respondent.

REPLY TO RESPONDENT'S BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The petitioner was the accused and putative defendant before the "John Doe" at the time of his appearance by subpoena. This was unknown to him nor was he informed of such status until the conclusion of his testimony at the secret inquiry.

He was subpoenaed by the State to give evidence in the proceedings conducted for the purpose of establishing and inquiring into his guilt. He was, in fact, misled by the subpoena and by its very terms to believe he was to give evidence *on behalf* of the State and not against himself. He was served with this subpoena on the very morning he was to appear. The statement objected to by the respondent is established by the very words of the subpoena, and the inferences reasonably drawn therefrom. The issue of the subpoena and the compulsion therein and thereby to give testimony had been duly raised prior to this Petition. The issue thus raised was treated in the following language by the Wisconsin Supreme Court in disposing of this question and the questions with respect to the constitutionality of the "John Doe" statute and the proceedings conducted thereunder:

> "The other arguments of the defendant do not involve questions of jurisdictional defects or the facts do not constitute such a defect. The form of the subpoena used in the John Doe proceeding did not deprive the magistrate of jurisdiction to issue the warrant. If the defendant believes the subpoena was improper he could have refused to testify; having testified, the defendant waived his objection. Nor does the defendant's argument that he was compelled to testify while a suspect in violation of the Fifth and Fourteenth amendments of the United States constitution raise a jurisdictional question. The Fifth amendment is now applicable in effect to state proceedings by virtue of the Fourteenth amendment. Malloy v. Hogan (1964), 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. (2d) 653. If the defendant should not have been interrogated while a suspect without warning or advice that he was a suspect, his testimony was illegally obtained and the question of its use can be raised by a proper motion to suppress under sec. 955.09, Stats."

REPLY TO RESPONDENT'S STATEMENT OF REASONS FOR DENYING THE WRIT

I

Contrary to the respondent's statements of the basis of the Petition, it is not based on nor so narrowly limited to declaring the "John Doe" statute unconstitutional. The complete grounds have been repeatedly urged and stated in terms of the violation of the petitioner's rights, privileges, and immunities under the United States Constitution.

All the substantive grounds forming the basis of the Petition before this Court have been at issue, argued, and presented at all stages of the *habeas corpus* proceedings and prior to this Petition. The respondent specifically recognized the issue of the constitutionality of the statute in its appeal to the Wisconsin Supreme Court from the dismissal of the charges by the trial court and stated as follows in its brief arguing at page 17, under the Title:

> "III. EVEN IF THE DEFENDANT HAS STANDING TO CHALLENGE THE VALIDITY OF THE JOHN DOE BY THIS HABEAS CORPUS PROCEEDING, THE JOHN DOE IS VALID AND ITS USE HAS DEPRIVED DEFENDANT OF NONE OF HIS RIGHTS."

It argued specifically at page 18:

> "The *constitutionality of section 954.025, Stats.*, authorizing a John Doe investigation has been recently upheld by this Court in State ex rel. Jackson v. Coffey (1963), 18 Wis. 2d 529, 545-546, 118 N.W. 2d 939, and more recently, this Court has upheld the validity of the John Doe proceeding in question, State ex rel. Niedziejko v. Coffey (1964), 22 Wis. 2d 392."

The unconstitutionality of the "John Doe" statute was not claimed by the petitioner in the manner that respondent indicates. It was raised specifically in terms of the Fourteenth Amendment and was repeatedly urged in that form. This issue was succinctly urged again at page 13 of the Brief of Defendant in Error on Motion For Rehearing under the title:

> "The John Doe Statute Sec. 954.025 Stats. Is Unconstitutional as Violative of the Due Process Required by the Fourteenth Amendment."
>
> * * * *
>
> "There is a serious question as to the constitutionality of the whole statute, aside from the unconstitutional grant of Star Chamber or inquisitorial powers. It is manifest that if in law the magistrate did act within the powers and jurisdiction granted to him by the statute on the basis of the entire record before the Court, then this statute avoids the requirements of due process, dictated by the Fourteenth Amendment. If a person accused can be compelled by subpoena under the pretext of giving evidence on behalf of the state at a secret proceeding without being informed of his status, without the right of counsel as guaranteed to an accused by the Sixth Amendment to the Constitution, compelled to give testimony under such circumstances without being advised of any of his rights contrary to the Fifth Amendment to the Constitution, and thereafter the magistrate has the power to charge such accused with criminality following such statutory proceeding conducted aforesaid, all without doing mortal insult to the jurisdiction granted by such statute to the magistrate, then such statute is unconstitutional.
>
> "The equitable rule applicable to individuals should be applicable to the State:
>
> > A State cannot do indirectly by or under statute what it is directly or expressly prohibited from doing by the Constitution.

> "The constitutionality of such statute is brought into question by the writ; 39 C.J.S. *Habeas Corpus,* §18, p. 458. The unconstitutionality of a statute under which detention is sought to be sustained is ground for relief on habeas corpus."

The respondent cites the case of *Michigan National Bank v. Robertson* (1963), 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. (2d) 961, as authority for denying jurisdiction. It is to be noted that the Court granted Certiorari and remanded the case for further proceedings not inconsistent with its opinion which, in effect, allowed the lower Court to consider the question raised at first instance in the Supreme Court.

It is respectfully submitted, that the case in point with respect to the issues before this Court raised by the respondent is *Raley v. State of Ohio* (1959), 360 U.S. 423, 79 S. Ct. 257, 3 L. Ed. (2d) 1344, at page 436:

> "The assignments of error made by Mrs. Morgan in the State Supreme Court show that she claimed in that court that the judgment of conviction was violative of due process, as guaranteed by the Federal Constitution, in that while she claimed the privilege, she was not 'charged with refusal to answer any questions asked by members of the Commission and that she was not notified that her claim of the privilege was rejected by the Commission.' The State Supreme Court passed on this claim, holding that a direction to answer was unnecessary because of the immunity statute, and stated generally that its reasoning and conclusions in her case 'apply with equal force to the appeal of Raley, Stern and Brown, 164 Ohio St. at page 532, 133 N.E. 2d at page 108. *There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.* See Manhattan Life Ins. Co. of New York v. Cohen, 234 U.S. 123, 134, 34 S. Ct.

874, 877, 58 L. Ed. 1245. *We think this sufficient here to satisfy the statutory requirement that the federal right sought to be vindicated in this Court be one claimed below.* 28 U.S.C. §1257(3), 28 U.S.C.A. §1257(3)." (Emphasis supplied)

II

The respondent has admitted that the petitioner was the accused when he was subpoenaed to appear before the "John Doe". Respondent also admits that the petitioner was never advised of his rights or status prior to the completion of his testimony before the "John Doe". Contrary to the facts in the case cited by the respondent—*United States v. Holovachka* (7th Cir., 1963), 314 Fed. 2d 345, cert. den. 374 U.S. 809, 83 S. Ct. 1695: rehearing den. 374 U.S. 859, 13 S. Ct. 1869—the petitioner herein was not a lawyer, did not appear in public hearing, and was never asked whether he wished to claim privilege, or that he could claim privilege, or whether he waived privilege, as were the facts in the case cited.

The inquiry complained of was not a police investigation but was in the nature of a judicial proceeding and was accusatorial and it secretly focused on the Petitioner as the accused and putative defendant.

III

The Petitioner's complaint about the "John Doe" as a Grand Jury substitute is not as limited or as stated by respondent. All the authorities and statutes cited by respondent as to how his future rights and privileges will be protected in the contemplated hearings and proceedings on the infamous crimes that he has been held to answer for as a result of the "John Doe" proceedings are held for naught. It is analogous to promising a man who

has been rendered totally blind that now every effort will be made to preserve his eyes. The petitioner's rights were compromised in the "John Doe". The charges of infamous crimes that he has been made to answer for were spawned from such hearing. No matter how legal, pious, and righteous the future hearings and proceedings may be, they cannot legitimately endow or restore those compromised rights with respect to or as they relate to the infamous crimes charged as a result of the "John Doe". The preliminary hearing with all its safeguards during such hearing becomes a mockery and travesty on Justice when applied after the warrant and complaint have already issued out of the "John Doe". The dirty deed has already been done. The faulty foundation laid by the "John Doe" cannot be adequately corrected without removal of all the charges which rest on or resulted from such proceeding.

IV

In *Fay v. Noia* (1963), 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. (2d) 837, the long history of the writ for *habeas corpus* as used in the case at bar was reviewed. It unequivocally established that it is properly issued, as in the case at bar, where fundamental rights have been violated. This court specifically stated as recognized by the trial court, but contrary to the ruling of the Supreme Court of Wisconsin, that *habeas corpus* is not available only to inquire into the jurisdiction in a narrow sense, of the committing magistrate. Also see: *Blackstone Commentaries,* 129-132; *Carbo v. U. S.* (1961), 364 U.S. 611, 81 S. Ct. 338, 5 L. Ed. (2d) 329.

V

The respondent cites as ruling authority the recent case of *Goyer v. State of Wisconsin* (1965), 26 Wis. (2d) 00, 131 N.W. (2d) 888, and quoted extensively from this decision. For the purpose of a complete citation, the last paragraph of the decision following the portion cited by respondent reads as follows, at page 892:

> "While some present justices of the United States supreme court favor incorporation of all provisions of the Bill of Rights into the Fourteenth amendment, it seems unlikely that a majority of the court will so decide thus freezing upon the states compulsory presentment or indictment by grand jury when so many jurists and students of criminal law do not regard it as essential to ordered liberty, and the trend for many years has been steadily toward its abolition."

VI

The respondent's argument concerning the "John Doe" statute and the unlimited discretion granted to the magistrate to the effect that by its terms there is a presumption that the magistrate will not abuse his discretion. If he does abuse his discretion, this abuse of discretion can be corrected prospectively but is of no relief to the person whose rights have already been abused or compromised by the magistrate's indiscretion. This is a justification put forth for a form of Star Chamber proceeding. It is fundamental that under the concepts of ordered liberty and a nation dedicated to the proposition of a nation of men under law, and not the contrary, that such proceedings which leave all the rights of a person to the discretion of the magistrate who has the power of a court to subpoena anyone before his secret inquiry under the

presumption that he will not abuse them is a clear invitation to tyranny.

Discretion is defined in *Black's Law Dictionary,* Third Edition, page 587 initially as:

> "Power or privilege of the court to act unhampered by legal rule. Osborn v. United States Bank, 9 Wheat. 866, 6 L. Ed. 204;"

Lord Camden stated in *Hindson v. Kersey* (1765), 8 How. St. Tr. 57 Fn.:

> "The discretion of a Judge is the law of tyrants: it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable."

VII

The Petition for Certiorari begs for definition of a magistrate's discretion as it affects the rights and privileges of a United States citizen.

The petitioner, at the very inception of the proceedings which were commenced to make him answer for the infamous crimes resulting from the proceedings conducted under the "John Doe" statute, urged his constitutional rights as a United States citizen and petitioner did so specifically by and in the petition and traverse for the writ of *habeas corpus*. He has in all stages of these proceedings relied upon, argued, and urged the relief guaranteed to him by the Fourteenth Amendment to the United States Constitution for the rights, privileges, and immunities compromised by the State, and also contrary to the Fifth and Sixth Amendments. The Supreme Court of

Wisconsin interpreted their applicability, but it is respectfully submitted, did so erroneously.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of the Petitioner. The Supreme Court of Wisconsin has erred in interpreting the United States Constitution and its Amendments to the effect that statutory proceedings which permit and violate the rights and privileges of a United States citizen who is made to answer for infamous crimes as a result thereof, that any errors or abuses of his constitutional rights in or by such proceedings were mere judicial or harmless error, or they were waived or they can be cured by rules of evidence.

The Constitution and its amendments as they provide guarantees of certain rights to individuals are to be respected and protected, and not subject to the harmless error rule, waiver without proof of affirmative knowledge of rights, interpreted merely by rules of evidence or their violation allowed as judicial error.

Respectfully submitted,

RAY T. MCCANN
Counsel for Petitioner

MICRO CARD 22
TRADE MARK ®

CD 47/62

MATTHEW BENDER & COMPANY

56-5

microcard